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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 296

THE BANKERS BOND COMPANY, INC.,
ELINORE SEDLEY, - - - - Petitioners,

versus

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of the Estate
of Charles D. Dunne, Deceased, - Respondents.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Denied October 11, 1965)

WILBUR FIELDS,
1529 Kentucky Home Life Bldg.,
Louisville, Kentucky 40202
Counsel for Petitioners, The Bankers Bond Company, Inc., and Elinore Sedley.

WESTERFIELD-SONTE CO., INCORPORATED, LOUISVILLE, KY.

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QUESTIONS PRESENTED.

1. Should a petition for rehearing be granted where the record before the Court shows:

   That the appellate court reformed the contract in issue changing its express terms and then enforced the contract as rewritten and construed?

2. Should this Court grant the petition, where the record shows that the contract in issue was procured by appellees' false representations, accepted by the Court and petitioners as true, that the bonds in issue were in possession of the Court Clerk, while in fact, as admitted by appellee after the appeal was filed, no representative of appellee had seen or had possession of the bonds during the preceding four years?

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ELINORE SEDLEY, - - - - - - *Petitioners,*

v.

ALL STATES INVESTORS, INC.,
JAMES E. DUNNE, II,
MOSES MASTER, Administrator of the Estate
of Charles D. Dunne, Deceased, - *Respondents.*

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

This petition is filed in reliance upon two points that controlled the decisions below, each of which this Court has considered to have merits in questions of reconsideration.

Neither of the petitioners, nor their counsel, can gain anything incident to the delay caused by the filing of this petition.

THE JUDGMENTS BELOW CREATE NEW LAW WITH RETROACTIVE APPLICATION, TO THE EXTENT THAT PETITIONERS COULD NOT HAVE KNOWN THE COURT OF APPEALS WOULD REFORM AND ENFORCE THE REFORMED CONTRACT.

The Courts below entered judgment substantially as demanded in the original cause of action, that had been terminated by a private contract of settlement, as reformed by the Court of Appeals. The Federal Securities Acts were no longer involved. The contract of settlement was in issue but it was never filed by any of the parties. It was executed in Kentucky, and was to have been performed in Kentucky. The laws of that state controlled its enforcement.

The federal questions now involved are constitutional questions. The Seventh and Fourteenth Amendments to the Constitution of the United States are directly applicable to the present issues.

The petitioners were denied the right of a trial on the charges of fraud and collusion of counsel in the District Court proceedings. They have been deprived of their properties without due process of law, in violation of the FOURTEENTH AMENDMENT, which guarantees equal protection of liberty and property.

The processess by which the petitioners have been deprived of their properties are unprecedented and unparalleled. Established procedures were ignored and procedures were invoked that changed then laws to fit the judicial objective, and enforced with retroactive application.

The judgment is punitive. The Respondent, All States Investors, Inc. breached a private contract of settlement (Appendix 57) by not delivering bonds it had sold and agreed to deliver by a named date, which was of the essence. Two months after the breach All States offered to execute an indemnity bond in lieu of the bonds it had agreed to sell. The Court was advised of an indemnity offer made after default, and held a conference on April 27, 1963. All States filed a motion for judgment prior to the conference (Appendix Pages 47-48). The Court directed All States to file an amended motion for judgment, which was done (Appendix Page 51). The Court issued orders directing payment of $105,000.00 by fixed dates, under penalty that if petitioners did not obey, that a judgment would be entered against them for $257,500.00 with eight years' interest. First a judgment was entered for $257,500.00 with eight years' interest, the enforcement of which was shortly thereafter suspended, pending reconsideration of the question of interest. The final judgment awarded interest from date. The rulings of the District Court were:

> "Moreover, the Court finds that the negotiations of the parties, subsequent to discovery of the loss of the bonds, resulted in a modification of the settlement agreement whereby the assignment, release, and indemnity agreement, and the guaranty agreement, would be substituted in lieu of delivery of the bonds." (Appendix page 53).

> "The Court is of the opinion that the negotiations were such that upon tender of the indemnity and guaranty agreements by the plaintiff, an agree-

ment to modify the original settlement was accordingly effected." (Appendix Page 54).

"By the device of substitution of counsel, however, the defendants will not be permitted to withdraw their consent to an agreement voluntarily and knowingly entered into by them. Neither are they entitled to a rehearing upon an adverse ruling merely by reason of substitution of counsel." (Appendix page 60).

The Court of Appeals reached its decision upon a premise that the bonds were worthless by finding that an Interlocutory Order made in 1959, in the action which was settled, was sua sponte final. That petitioners consented to entry of judgment against them for $257,500.00, stating:

"It is in the nature of a judgment by consent."

In *United States, Appellant* v. *Ward Baking Co.*, 376 U. S. 327, 11 L. Ed. 2d 743, 84 S. Ct. 763, decided March 9, 1964, a "consent" judgment was vacated and the case remanded for trial, the Court stating:

"We decide only that where the Government seeks an item of relief to which evidence adduced at the trial may show that it is entitled, the District Court may not enter a 'consent' judgment without the actual consent of the Government."

The Court of Appeals agreed with the District Court that an attorney can control the substantive rights of his client, over the objections of the client made known to the Court by the client, in the absence of fraud or collusion, which in this case, the petitioners

moved for leave to allege and prove, which was denied them.

The Court of Appeals ruled:

> "Under these circumstances we are of the opinion that the failure to deliver the bonds was not a material variance from the terms of the contract and would not excuse performance on the part of the defendants Bankers Bond and Mrs. Sedley. We agree with the trial judge that there was substantial performance on the part of All States Investors, and that the failure to deliver the bonds, under the circumstances, did not constitute a material failure of performance."

The Court of Appeals did not concur with the District Court that petitioners had agreed to a modification of the settlement contract, having reached the conclusion that the contract did not require modification to find that the petitioners breached its terms.

Had All States Investors delivered the bonds by February 23, 1963 they would have received $105,000.00. The judgments are for $257,500.00 for an indemnity against liability—not for the value of the bonds. The District Judge was confused in his rulings on this question.

The Court of Appeals reformed a contract to pay $105,000.00 and forthwith imposed a retroactive penalty of $152,500.00 for failure to comply in 1963 with the contract made by the judgment in 1965.

Petitioners suggested to the Court of Appeals, in their Petition for Rehearing, that judgment be entered for $105,000.00, the amount due under the contract, as reformed by the Court.

This Court contemporaneously with the proceedings in this action decided that consent to the entry of a judgment cannot be presumed; that substantial justice is a right of parties to an action, and that ambulatory judicial decisions cannot, under due process, be enforced retroactively so as to deprive a man of his liberty. Due process is equally applicable to depriving a man of his property.

In *Simon Bouie, et al.* v. *Columbia,* 378 U. S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697, the question of application of due process was before the Court, in a civil rights, sit-in, case.

The Court found that a statute precise on its face had been "Unforeseeably and retroactively expanded by judicial construction," . . .

The opinion states that:

> "The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question."
>
> . . . . . .
>
> "If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect."
>
> . . . . . .
>
> "It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment."

SUBSEQUENT TO FILING OF THE APPEAL, PETITIONERS IN AN ACTION FILED BY ALL STATES INVESTORS, INC. PROVED BY ADMISSIONS OF ALL STATES THAT IT HAD NOT HAD THE BONDS IN ISSUE SINCE 1959. THE REPRESENTATION THAT THE CLERK HAD THE BONDS IN 1963 WAS INTENTIONAL FRAUD, MADE TO INDUCE A SETTLEMENT WHICH WOULD NOT HAVE BEEN MADE IF THE TRUTH HAD BEEN KNOWN.

The Notice of Appeal was filed on May 23, 1964. The petitioners could not supersede the judgment. The respondent All States Investors on June 12, 1964 filed action No. 4803, in the United States District Court in which this action was filed, against the petitioner Elinore Sedley to set aside three conveyances made by her.

By answer and counterclaim Mrs. Sedley pled several affirmative defenses, authorized by F.R.C.P. 60 (3) (6) that the judgment was void, and by counterclaim alleged that All States Investors was never the owner of the bonds in issue and that the plaintiff falsely and fraudulently represented to petitioners that it had delivered the bonds to the Clerk of the Court; that petitioners relied upon the false representations and were thereby induced to sign the settlement agreement in issue in this action.

Requests for Admissions and Interrogatories were served on All States Investors, Inc. for the purpose of proving that the corporation was a $1000.00 corporation on paper with no office, officers or directors; that the corporation had never been in possession of any

West Buechel bonds, and the ultimate fact that the attorney of record for All States had made a false and fraudulent representation that he had delivered the bonds to the Clerk, which induced petitioners to sign the stipulation on January 23, 1963 reciting that the bonds which All States agreed to sell to petitioners were in possession of the Clerk, when, in fact, the attorney for All States knew that they were not.

The Courts below excused All States by ruling there was a mutual mistake, which if true would make the contract unenforceable. The Interrogatories, Requests for Admissions and Answers, were copied in an appendix to the Petition for Rehearing in the Court of Appeals and are now part of the record forwarded to this Court. The Court of Appeals refused to consider the proceedings by order entered on May 20, 1965 (Appendix Page 100, Petitioner's Brief).

All States in answer to request No. 3 (Appendix, Court of Appeals Petition for Rehearing 2a) admitted that

> "No officer, agent, servant or employee of All States Investors, Inc. has seen them (bonds) since they were produced in open Court and left on a table in the Courthouse at the time the jury was discharged as hung."

The jury was hung at the first trial in 1959, four years prior to the January, 1963 contract.

Counsel for All States knew that the bonds were not in its possession when the action was called for trial. He knew that his representation that the bonds had been filed with the Clerk was false. Petitioners

could not have been induced to agree to settle the case had it known that All States did not have the bearer bonds. The Clerk on October 9, 1963 stated the bonds had not been filed and that the settlement agreement had never been filed nor seen by him (Appendix Page 56).

Any final judgment may be set aside for mistake or fraud on a party or the Court or for any other justifiable reason F.R.C.P. 60 (1) (3) (6).

The Court of Appeals was in error in overruling the motion to review action 4803, disclosing that the parties were not mistaken; that a fraud had been perpetrated on the Court.

The District Court ruled (Appendix Page 52):

> "On the basis of the record it appears undisputed that the subject bonds are, by accident and without fault or intention, lost, stolen, or misplaced, and the Court so finds."

The Court would not permit petitioners to plead or prove the facts. The bonds were not filed in the first trial.

A question presented by this petition is whether the final decision should be based upon what is true, or upon erroneous judicial speculations. This Court does not hesitate to learn the available truth. There is no limitation on the power and jurisdiction of an appellate court to do so.

In *Smith* v. *Pennsylvania,* 376 U. S. 354, 11 L. Ed. 2d 753, 84 S. Ct. 763, the point in issue on certiorari was whether the trial court's statement in support of a rul-

ing that the Federal Government had indicated it would not honor a requested subpoena. This Court made inquiry and learned that the Department of Justice was not informed of, and did not refuse to comply. In light of that representation, the writ was granted for reconsideration of the petitioners' claim.

The Rules of Procedure grant petitioners the right to prosecute the pending action to set aside the judgment before the Court, on the grounds of mistake or fraud. It is within the inherent power of the Court to purge an action tainted with fraud upon the Court at any time. Therefore, the Court is urged to sustain the petition.

For the reasons stated, petitioners submit that the grounds for this petition are extraordinary and that it should be granted. Petitioners would eagerly meet All States Investors on any legal issue between them, including the original claim.

Respectfully submitted,

WILBUR FIELDS,
1529 Kentucky Home Life Bldg.,
Louisville, Kentucky 40202

Counsel for Petitioners, The Bankers Bond Company, Inc., and Elinore Sedley.

CERTIFICATE OF COUNSEL.

Counsel for petitioners hereby certifies that this petition is presented in good faith and not for delay, and to avoid delay in pending proceedings to set aside the judgment pursuant to F.R.C.P. 60 (1) (3) and (6).

WILBUR FIELDS